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No. 89-1799

In The

Supreme Court of the United States

October Term, 1990

JEFFREY M. MASSON,

Petitioner,

vs.

THE NEW YORKER MAGAZINE, INC., ALFRED A. KNOPF, INC., JANET MALCOLM,

Respondents.

On *Writ Of Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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On *Writ* Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation (MSLF) respectfully submits this brief *amicus curiae* on behalf of its members.[1]

[1] *Amicus* has obtained the written consent of all parties. The written consent of all parties has been provided to the Clerk of the Court under separate cover.

INTERESTS OF *AMICUS CURIAE*

Mountain States Legal Foundation is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system.

MSLF members include businesses and individuals who live and work in nearly every state of the country. A large number of the Foundation's members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in so-called environmental issues.

The impact of the instant decision upon MSLF members is particularly disturbing. Business leaders, elected officials and candidates for public office, as well as private citizens, all have learned to be careful and precise in their use of language when discussing controversial environmental issues which are volatile and evocative of media and public attention. MSLF is active on behalf of its members in crucial public discourse regarding issues of vital national importance – for example, the balancing of economic and environmental objectives in timber harvesting in the Pacific Northwest. It is this type of informed discourse which will be chilled if the instant decision is permitted to stand. Permitting this decision to stand will cause all Americans, including those represented by MSLF, to suffer the loss of vital freedoms.

The interests of Petitioner and Respondents are with the impact of the decision below on each of them individually. Since the action is one in tort, the questions for

Petitioner and Respondents are ones of liability and damages.

However, the interests of *amicus curiae* Mountain States Legal Foundation are those of the long term impacts of the decision below on public interest issues, including but not limited to the ability of public figures involved in controversial issues to be "quoted" correctly by the media, the willingness of public figures involved in controversial issues to engage in free and open discourse regarding those important public policy issues, and the ability of the media to retain the trust and confidence of the American public when reporting on important public policy issues.

In sum, at stake is the survival of the proper balancing of the freedom to protect one's reputation and the freedom that assures free and open discourse on issues of public concern. In achieving that balance, it is vital that consideration be given to the impact this decision will have on the free and open discussion of issues of public concern.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Amicus adopts Petitioner's Statement of the Case. However, *amicus* supplements Petitioner's Statement of the Case with the following analysis of the decision by the Ninth Circuit Court of Appeals.

In its opinion, (App. A at A-10), the Ninth Circuit Court of Appeals summarized the "state of the current

law governing the defamatory nature of statements ostensibly ascribed to another person by the use of quotation marks." According to that summary:

> – "A factfinder may infer actual malice from a fabricated quotation when the language attributed to the plaintiff is wholly the product of the author's imagination." *Carson v. Allied News Co.*, 529 F.2d 206, 213 (7th Cir. 1976).
>
> *BUT*: "An author may . . . under certain circumstances, fictionalize quotations 'to some extent.' " *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir.), *cert denied sub nom. Hotchner v. Doubleday & Co.*, 434 U.S. 839 (1977).
>
> *HOWEVER*: "An author's privilege to alter quotations is not unlimited." *Bindrim v. Mitchell*, 92 Cal.App. 3d 61, 70, 155 Cal.Rptr. 29, 34, *cert. denied*, 444 U.S. 984 (1979).

Based on the interpretation of the Ninth Circuit Court of Appeals of the "state of the current law," the Court held that fabricated quotations are permissible when:

– they are " 'rational interpretations' of ambiguous remarks made by the public figure . . . ," *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446, 452 (3rd Cir. 1987), or

– they do not " 'alter the substantive content' of unambiguous remarks actually made by the public figure." *Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir.), *cert denied sub nom. Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977).

SUMMARY OF ARGUMENT

This is one of the most important and far-reaching cases to come out of the Ninth Circuit Court of Appeals in years. It is not only deeply disturbing for any who are required to deal with the press on a frequent basis – whether public interest lawyer, attorney in the private practice of law, public official, or businessman or businesswoman dealing with the controversial issues of the day. It is also devastating for the media.

Already the subject of much public skepticism, the press can ill afford yet another blow to its credibility or motives. This decision, if left standing, would administer such a blow: the public would conclude that since the courts permit journalists to make up "quotations" to satisfy the needs of their story, then all "quotations" are manufactured.

It seems so fundamental and beyond debate that quotation marks bracketing a group of words mean that those words, and no others, are the words of the individual being quoted. But, as Judge Kozinski points out in the very first paragraph of his dissent below, (App. A at A-32), that is exactly what this case is about. Do quotation marks mean that the words are those of the speaker?

Business leaders, politicians, and private citizens all have learned to be careful and precise in the words they use when discussing controversial issues. Over the past several years, business leaders and other public figures have schooled themselves on ensuring that their views are accurately conveyed to the public through the media. Business leaders and public figures have become so sensitized to the strong emotional baggage carried by some

words and phrases, that they eschew such words in their communications with the media.

If this decision is allowed to stand, such caution and precision is useless. A member of the media will be able to fabricate "quotations" that he or she believes are "rational interpretations of ambiguous remarks" or that "do not alter the substantive content of unambiguous remarks actually made." Under these circumstances it would be foolhardy for public figures to speak to the media.

Why should a reporter be free to make up a "quotation" when the language used by a public figure is ambiguous? In the event of such spoken ambiguity, isn't it the responsibility of the reporter to ask simply, "What did you mean by that?" and thereby seek to obtain a *real* quote?

For example, a public figure, speaking of the dangers to timbermen of the presence of "spikes" in trees – driven by those who seek to prevent timber harvesting – says: "The timberman who enters a spiked forest is walking the point in Viet Nam, never knowing when his chainsaw will hit a spike and seriously injure or kill him." Can a reporter, finding some ambiguity in that statement, quote the public figure as saying, "There is no difference between those who drive spikes in trees and the Viet Cong?" Under the decision below, the answer is "yes."

While different "quotations" may be the same substantively, isn't a public figure entitled, not only to the denotation of the words which he or she has chosen, but to the connotation as well? Thus the difference between

"his father and mother never married" and "he's a bastard" is somewhat startling to the reader – the latter carrying powerful, overwhelming emotions. However, both "mean" the same thing. While the burdens imposed upon reporters are quite limited under the First Amendment, don't those burdens include the requirement to "quote" only the exact words spoken? Under the decision below, the answer is "no."

Equally chilling is the breadth of fabricated quotations permitted by the holding of the Ninth Circuit Court of Appeals in the event of a public figure's "self-appraisal." (App. A at A-18). Under the decision below, a reporter who believes he or she has discerned the "substance of [a public figure's] self-appraisal" may attribute to that public figure – in the words of Judge Kozinski – "any other statement reflecting that same trait." (App. A. at A-39). Thus, care in the use of one's language is in vain if one happens to convey sufficient information to constitute a "self-appraisal" permitting the reporter to attribute to the public figure any quote consistent with that "self-appraisal." What public figure would be foolhardy enough to reveal any aspect of his or her character for fear that from that character assessment would spring a wealth of "quotes" that "reflect the substance of [that] self-appraisal?"

Must the public figure whose "self-appraisal" includes characterizing himself as "just a country lawyer" abide "quotations" which the reporter concludes a country lawyer might make? Must the public figure whose "self-appraisal" includes acknowledgement that she is "a coal miner's daughter" bear whatever "quotations" a reporter would conclude a country girl might make. Does

a "self-appraisal" by a public figure that he or she is "a devout Catholic," "a born-again Christian," "an orthodox Jew," "an ex football player," "a former Marine," "a feminist" open that public figure up to whatever stereotypical "quotations" a reporter would care to ascribe to the public figure? Under the decision below the answers are "yes."

Not only business leaders and other public figures involved in controversial public policy issues will suffer if this decision stands. The media and, in the end, the American public and its greatly revered and protected freedom of the press will also be adversely affected.

Which will go first – the willingness of public figures to talk to the media, or the willingness of the public to believe the media? The answer is uncertain. Yet, in the end, both will disappear. The public will quickly learn that the media is free to make up "quotations" and the public will increasingly distrust the media. Coincidentally, public figures will not talk to the media for fear of being the victims of fabricated "quotations." It is hard to imagine what could have a greater "chilling" effect on free speech by a public figure than the fear of fabricated "quotations."

Thus, the goal sought by our Founding Fathers, free and open discourse on issues of public concern, will be thwarted.

This Honorable Court should reverse the decision below not just because it is in conflict with decisions of this Honorable Court; not just because it is in conflict with the decisions of other Courts of Appeals; not just because it is in conflict with the relevant law in the State

of California; although each one of these provides a more than adequate basis for reversal. Rather, this Honorable Court should reverse the decision below because of the threat it represents to the preservation of the intent of the First Amendment and its goal of free and open discourse of vital public policy issues.

ARGUMENT

I. A True, Direct, Intolerable And Irreconcilable Conflict Exists Between The Decision Below And Decisions Rendered By This Honorable Court.

A. The Decision Below Is In Conflict With The Decisions Of This Honorable Court Which Seek To Achieve A Balance Between Protecting The Rights Of An Individual To His Good Name And The Free Flow Of Opinions And Ideas.

This Honorable Court has long struggled "to define the proper accommodation between the law of defamation and the freedom of speech and press protected by the First Amendment." *Gertz v. Welch*, 418 U.S. 323, 325 (1974). That struggle reflects this Honorable Court's efforts to balance "the individual's right to the protection of his own good name," *Id.*, at 341, with "the free flow of opinions and ideas [which lie] at the heart of the First Amendment," *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988), and is "essential to the common quest for truth." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503 (1984).

This decision from the Ninth Circuit Court of Appeals, in one fell swoop, demolishes nearly two hundred years of that balancing and destroys not only the

ability of an individual to protect his own good name, but the very purpose of the First Amendment. It is difficult to envision a more pernicious decision, or a decision which does more harm at one time, than does the instant decision of the Ninth Circuit Court of Appeals.

This Honorable Court should reverse the decision below in order to return the balancing of these two competing but not mutually exclusive goals.

B. The Decision Below Is In Conflict With The Decisions Of This Honorable Court Which Have Assured To An Individual The Right To Protect His Good Name.

As was noted in *Rosenblatt v. Baer*, 383 U.S. 75:

> The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendment. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

Id., 92 (Mr. Justice Stewart concurring).

C. The Decision Below Is In Conflict With The Decisions Of This Honorable Court Which Have Refused To Extend Constitutional Protection To A "Calculated," Or "Deliberate," Or "Reckless" Falsehood.

The decision of the Ninth Circuit Court of Appeals is directly contrary to the refusal of this Honorable Court to

sanction a "calculated falsehood," that is, "the lie, knowingly and deliberately published." *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964). This Honorable Court has consistently refused to extend the protection of the First Amendment to those "unscrupulous and skillful enough to use the deliberate or reckless falsehood." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2696, n. 34 (1989).

As the dissent below makes clear, (App. A at A-54 to A-55), the decisions of this Honorable Court in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), and *Time, Inc. v. Pape*, 401 U.S. 279 (1971), provide no support for the exception which the Ninth Circuit Court of Appeals seeks to carve out and are, in fact, in direct conflict with the decision below. *Bose* and *Pape* stand for the proposition that malice may not be inferred from inaccurate language chosen to describe an event where the description is " 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities.' " *Bose*, 466 U.S. at 512-13, quoting *Pape*, 401 U.S. at 290.

This Honorable Court, in *Bose*, sought to protect the essence of the First Amendment by recognizing the "descriptive challenges," *Bose*, 466 U.S. at 512, faced by the writer. However, no such "descriptive challenges" face a writer who, by the use of quotation marks, represents the words to be those of the speaker and not his or her own. While this Honorable Court, in *Pape*, permitted a news magazine to publish out-of-context quotations, nowhere in that decision is the use of fraudulent quotations condoned.

This Honorable Court has never afforded First Amendment protection to the writer of a "calculated falsehood." Since the decision of the Ninth Circuit Court of Appeals provides First Amendment protection for just such a "calculated falsehood," that decision is in direct conflict with the decisions of this Honorable Court. The decision below should be reversed.

D. The Decision Below Is In Conflict With The Decision Of This Honorable Court Which Leaves To The Factfinder A Determination Of Whether Actual Malice Exists In A Particular Case.

In *St. Amant v. Thompson*, 390 U.S. 727 (1968), this Honorable Court held that it was for the trier of fact to determine whether the publication was made without actual malice. However, "professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant [or] is the product of his imagination. . . . " *St. Amant*, 390 U.S. at 732.

Nonetheless, the Ninth Circuit Court of Appeals held that Respondents were cloaked in the protective embrace of the First Amendment and hence immune from a determination of liability by the factfinder. This holding of the Ninth Circuit Court of Appeals is in direct conflict with the decisions of this Honorable Court. The decision below should be reversed.

E. The Decision Below Is In Conflict With The Decision Of This Honorable Court Setting Forth The Basis For Considering A Motion For Summary Judgment In A Libel Action.

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Honorable Court held that, in considering a motion

for summary judgment in a libel action, the "evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.*, at 255. Yet in the case below, as Judge Kozinski made abundantly clear in his dissent, (App. A at A-44 to A-45), the Ninth Circuit Court of Appeals simply failed to believe the Petitioner.

II. A True, Direct, Intolerable And Irreconcilable Conflict Exists Between The Decision Below And Decisions Rendered By Other Courts Of Appeals.

A. The Decision Below Is In Conflict With The Decision Of Another Circuit Which Refused To Accord First Amendment Protection To Fabricated Quotations.

The Ninth Circuit Court of Appeals cites *Carson* for the proposition that a writer cannot "invent quotations and attribute them to actual persons." *Carson*, 529 F.2d at 213. Yet despite the court's recognition of the holding in *Carson*, and despite the analogous factual underpinnings of *Carson* with the instant case, the Ninth Circuit Court of Appeals choose to ignore not only its own general rule, but the rule from the Seventh Circuit which it cites as authority.

It is difficult, if not impossible, to ignore the holding of the Seventh Circuit in *Carson*, yet that is what the Ninth Circuit Court of Appeals has done. For in *Carson*, the Seventh Circuit denied First Amendment protection to fabricated quotations which the writer described as "a logical extension of what must have gone on," since, in the words of the Court, in the fabricating and imagining of such "facts" the author must have "entertained serious

doubts" as to their truth and "a high degree of awareness of their probable falsity." *Carson*, 529 F.2d at 213.

In the instant case, the writer did not simply entertain serious doubt as to the truth or possess a high degree of awareness of the probable falsity of the "quotations" which she fabricated. She knew for a fact that they were false since she was there with Petitioner and had a tape recording to verify whether or not he said the words which she attributed to him.

Instead of adhering to the rule of the Seventh Circuit, a rule which it endorsed, the Ninth Circuit Court of Appeals pursued an exception to the general rule. Yet there exists no such exception. The decisions of the Second and Third Circuit Courts of Appeals, which the Ninth Circuit Court of Appeals cites as its authority, certainly provide no basis for such an exception.

There is no exception whereby, in the words of the Ninth Circuit Court of Appeals – citing *Hotchner* – "[a]n author may . . . under certain circumstances, fictionalize quotations 'to some extent'." (App. A at A-10). *Hotchner* did not address the ability of a misquoted public figure to bring an action for defamation against the author who misquotes him. Instead, *Hotchner* involved an action by the person discussed in the quotation, and whether the defendant's republication of the original remark by Ernest Hemingway (albeit a kinder, gentler version of that remark) was libelous as it related to the individual discussed by Hemingway. *Hotchner* would only be in point if it addressed the ability of Hemingway's estate to

bring a defamation action, in his name, for the publisher's revisions of Hemingway's original remark. *Hotchner* offers the Ninth Circuit Court of Appeals no authority for concluding that a reporter may fabricate "quotations" and attribute them to the alleged speaker of the words.

The Ninth Circuit Court of Appeals set forth two "circumstances" where fictionalized quotations are permissible, but neither case cited as authority stands for that general proposition.

The Ninth Circuit Court of Appeals held that *Dunn* stands for the proposition that an author may fabricate quotations if those quotations are "rational interpretations" of ambiguous remarks of a public figure. (App. A at A-10 to A-11). However, that is not the holding of *Dunn*. *Dunn* relates solely to whether the speaker of words, in English, could maintain a cause of action against a newspaper which attempted to translate those words into their Spanish equivalent.[2]

Even if *Dunn* is not simply a translation case, it is inapposite. Even if *Dunn* stands for the proposition that a writer may fabricate quotations in an attempt to summarize – as maintained by the Ninth Circuit Court of Appeals – those are not the facts in the instant case. Respondents here did not represent that they were summarizing the remarks of Petitioner, but indicated that the quotations were the very words from his mouth.

As to the second exception offered by the Ninth Circuit Court of Appeals, permitted when the fabricated

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[2] That is, is it libelous to translate "litterbug" into the Spanish "cerdeo" meaning "pig." (App. A at A-50).

quotations "do not 'alter the substantive content' of unambiguous remarks actually made by the public figure," (App. A at A-11), the cases cited, including *Hotchner*, are not supportive. As noted above, *Hotchner* does not address the factual situation of the instant case.

The decision of the Ninth Circuit Court of Appeals is in direct conflict with the decision of the Seventh Circuit Court of Appeals. The decision below should be reversed.

B. The Decision Of The Ninth Circuit Court Of Appeals Is In Direct And Intolerable Conflict With The Decisions Of Other Circuits On Other Points Of Law.

As noted above, the decision of the Ninth Circuit Court of Appeals is in conflict with the decision of this Honorable Court in *Anderson v. Liberty Lobby, Inc*, 477 U.S. 242 (1986). The decision of the Ninth Circuit Court of Appeals is also in direct conflict with decisions of other circuits which have correctly applied the holding of *Anderson*, including *Zerangue v. TSP Newspapers, Inc.*, 814 F.2d 1066, 1072 (5th Cir. 1987) and *Schiavone Construction Co. v. Time, Inc.*, 847 F.2d 1069, 1089-93 (3d Cir. 1988).

The Ninth Circuit Court of Appeals improperly applied the clear and convincing evidence standard rather than the preponderance of the evidence standard, putting the Ninth Circuit Court of Appeals in conflict with the decision of *Goldwater v. Ginzburg*, 414 F.2d 329, 341 (2d Cir. 1969), *cert. denied*, 396 U.S. 1099 (1970). The standard of proof question was left open by this Honorable Court in *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. ___, 109 S.Ct. 2678, 2682 n. 2 (1989).

The Ninth Circuit Court of Appeals decision also puts it in direct and intolerable conflict with the District of Columbia Circuit since the latter circuit has repudiated the incremental harm doctrine. *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984) *rev'd on other grounds*, 477 U.S. 242 (1986).

III. A True, Direct, Intolerable And Irreconcilable Conflict Exists Between The Decision Below And Another Decision Rendered By Courts Of The State Of California.

Since the instant case involves an action in tort for defamation, the law of the State of California is the relevant law for determining whether there exists a cause of action.

The Ninth Circuit Court of Appeals cites *Bindrim* for the proposition that "reckless disregard for the truth [is] apparent from [the defendant's] knowledge of the truth of what transpired . . . [since] the defendant . . . was in a position to know the truth or falsity of her own material. . . . " *Bindrim*, 92 Cal.App.3d at 73.

Despite the analogous factual underpinnings of *Bindrim* with the instant case, the Ninth Circuit Court of Appeals chose to ignore the holding of *Bindrim*. What could be more directly on point than the following conclusion of the court in *Bindrim*: "Since she attended sessions, there can be no suggestion that she did not know the true facts?" *Bindrim*, 92 Cal.App.3d at 73. (Quoted in App. A at A-6). To paraphrase, "Since [Ms. Malcolm] attended [interview] sessions [with Plaintiff], there can be no suggestion that she did not know the true [statements

made by him]." Thus the decision of the Ninth Circuit Court of Appeals is in direct conflict with the decision of the California court. The decision below should be reversed.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be reversed. The insidious assault that this decision unwittingly permits against our most precious Constitutional freedoms – the freedom to protect one's reputation and the freedom that assures free and open discourse on issues of public concern – must be turned back.

Respectfully submitted,

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